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# Virginia Law Register

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## IS SECTION 508 OF THE CODE, AS AMENDED, CONSTITUTIONAL?

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Of all the changes in our statutes which are made at each session of the General Assembly none perhaps arouse a livelier feeling of interest in the public mind or more closely engage the attention of public officers and members of the legal profession than those affecting the laws composing our revenue system. Of these laws, generally classified under the broad designation of tax laws, those which relate to what are variously termed omitted taxes or back taxes never fail to evoke the closest scrutiny and keenest criticism. During the past four years the matter of the discovery and assessment of property, particularly that roughly classed as intangibles, which had escaped taxation in due season has claimed a large measure of attention; hence the importance of an act of the General Assembly, approved on March 15, 1918, by which section 508 of the Code of Virginia was so amended as to work a distinct and radical change in the policy of the State in this regard. This act will presently appear as Chapter 254 of the Acts of the Assembly for 1918.

For many years the State claimed and exercised the right of requiring its taxing officers to assess subjects of taxation which had been omitted from the tax rolls, whether through the ignorance or fraudulent concealment of the owners or the negligence of the officers, and the distance in point of time that the assessor might "go back" for omitted taxes was either unlimited or to a specified year which was fixed upon for reasons of expediency. The reasons which gave currency and force to the ancient maxim, *Nullum tempus occurrit regi*, were most probably in the minds of those legislators of other days who formulated the State's policy with relation to omitted taxes as it came to be expressed in section 64 of chapter 35 of the Code of 1849, section 70 of chapter 35 of the Code of 1860, section 70 of chapter 33 of the Code of 1873, and finally in section 508 of the Code of

1887. This last mentioned section, first enacted as section 62 of chapter 61 of the Acts of Assembly of 1881-2, approved April 21, 1882, reads as follows:

"If the commissioner shall ascertain that any person, or any real or personal property, or income, or salary, has not been assessed for taxation for any year, or that the same has been assessed at less than the law required for any year, or that the taxes thereon for any cause have not been realized, it shall be the duty of the commissioner to list the same, and assess the taxes thereon at the rate prescribed for that year, adding thereto interest at the rate of six per centum per annum. Where the same was omitted by no fault of the person charged with the taxes, no interest shall be charged."

It will be observed that under authority of this statute the period of time within which a Commissioner of the Revenue might "go back" for omitted taxes was without limit. In this respect the act of April 21, 1882 (section 508 of the Code of 1887), differed from the act of June 29, 1870 (section 70 of chapter 33 of the Code of 1873), in that the latter fixed the limit at the year 1865 for reasons even now too obvious to require comment. Save for certain amendments not material to this discussion this section remained undisturbed until 1916. By chapter 491 of the Acts of Assembly for 1916, section 508 was amended with respect to the period within which assessments might be made for State taxes by the addition of a proviso fixing the date at 1903. Since then no assessments have been made for years prior to 1903, as indeed but little was done toward assessing property for years prior to 1903 in 1915 (the year which witnessed the beginning of a determined effort by the State to discover and tax omitted property), though in the years 1915, 1916 and 1917 the aggregate value of intangible personal property, money and income reported and taxed as "omitted" reached the startling sum of \$300,920,877.

By act approved on March 15, 1918, as already stated, the General Assembly has again amended section 508 and this section, so far as it need be noted here, now reads as follows (*italics are the writer's*):

"Section 508. Omitted taxes, levies, etc., how assessed.—If the commissioner of the revenue, examiner of boards or

other assessing officer, commission or board designated by law to assess persons, property (real, personal and mixed), taxes, levies, et cetera, ascertain that any person, or any real or personal property, or income, or salary, or license tax or *inheritance tax* has not been assessed, for any year of *the three years next preceding that in which such ascertainment is made*, by the State, county, district, city or town, or that the same has been assessed at less than the law required for any one or more of such years, or that the taxes, levies, et cetera, thereon, for any cause, have not been realized, it shall be the duty of the commissioner of the revenue, examiner of records, or other assessing officer, to list the same and assess persons, property (real, personal and mixed) and levies at the rate prescribed for that year, adding thereto interest at the rate of six per centum per annum from the time such taxes should have been paid, and any treasurer collecting such taxes and levies shall also collect the penalty thereon prescribed by section six hundred and three of the Code."

The decided change worked by this amendment becomes apparent at a glance. Formerly assessments of omitted property might be made for any year, or for any year or years subsequent to a given date, and the period within which they could be made increased with the lapse of time until curtailed by special legislative enactment. Now there is provided a limited number of years which the assessing officers may take into consideration with respect to omitted property; and this period of time is fixed as to its length and is moveable so as not to increase with the passing years.

Whether or not the policy thus inaugurated in Virginia is a wise one is not the purpose of this article to discuss. There are things which can be seen with certainty only in the light of experience. The amendment has given rise, however, to a question which can be discussed now. *Is section 508 as amended, constitutional?* It has been suggested that the amended section is repugnant to each of three sections of the Constitution of Virginia of 1902, viz.: section 168, which directs that all property shall be taxed; section 183, which prohibits the exemption from taxation of any property not specifically declared exempt by Constitutional provision; and sections 174, which provides that no statute of limitation shall run against any claim of the State for

taxes upon any property, and that the failure to assess property for taxation shall not defeat a subsequent assessment of such property.

Of these in the order mentioned section 168 of the Constitution reads as follows:

“Sec. 168.—All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.”

It may be argued that amended section 508 is repugnant to this constitutional provision which requires that *all* property shall be taxed, in that the statute which provides in effect that such property as is not put on the tax rolls within three years after it should have been listed shall not be assessed for taxation for the time in which it was omitted. It is believed that this contention cannot be sustained. If it were meritorious it would logically follow that *no* property could be taxed until *all* property should be taxed: in other words, that *all* taxable property should be actually taxed or *none*; and that if all the property in the Commonwealth subject to taxation, with the exception of one negotiable note in the hands of a negligent taxpayer, should be listed, it would be unconstitutional to tax the property so listed until the fugitive note should also be placed upon the tax rolls. What the framers of the Constitution meant by section 168 was that all property of every class should be made to bear its due share of the burden of the State's expense, because to exempt any one class of property from taxation would be to deprive the owners of other classes of the equal protection of the State's laws and make an unjust discrimination against them.

All of section 168 must be read to get its true meaning and intent. It will be observed that this section not only requires that property of every class shall be taxed and the taxes made uniform as to the same class of subjects, but also that all taxes shall be levied and collected under general laws. Section 168 is not self executing, and the framers of the Constitution left it to the General Assembly to provide laws both for the classification of property for purpose of taxation and for the levying and

collection of such taxes as in the judgment of the General Assembly should be fair and necessary. Therefore, when the General Assembly provides a limited time within which property may be assessed such enactment is only one of such *general laws* as the framers of the Constitution had in mind when section 168 was formulated. Section 508 as amended does not exempt property from taxation but fixes the period within which property may be assessed. The law is general in its application. Within the time prescribed for the assessment of property "all property" is assessable, save that declared exempt, and that is all that is required by section 168 of the Constitution.

This question may be said to have been settled already by our Supreme Court of Appeals in the case of *Commonwealth et al v. United Cigarette Machine Co.*, 120 Va. 835. This case, while it related to county and district levies and not to State taxes, involved the constitutionality of sub-section 2 of section 508 as the same was amended by chapter 491 of the Acts of Assembly for 1916, limiting the time within which assessments of omitted property for local purposes could be made to the year 1912. In that case the plaintiffs in error contended that the act in question was contrary to section 168 of the Constitution in that it constituted an exemption of property not listed in due season prior to 1912. In disposing of this question, Kelly, J., who delivered the opinion of the Court used the following explicit language:

"It does not violate section 168 of the Constitution, directing that all property shall be taxed, that taxes shall be uniform, and shall be levied and collected under general laws. It is simply a limitation upon the time within which the political subdivisions of the State may correct an omission in the assessment of taxes. The mere direction of the Constitution that all property shall be taxed is inoperative without legislation as to the manner of imposing and enforcing the taxes. There can be no collection of taxes except in the manner provided by law; and back taxes can only be levied by special legislative authority. *Marye v. Diggs*, 98 Va. 752; *Whiting v. West Point*, 89 Va. 741, 743."

Section 183 of the Constitution, so far as the same need be quoted, provides:

"Except as otherwise provided in this Constitution, the following property, and no other, shall be exempt from taxation, State and local; but the General Assembly may hereafter tax any of the property hereby exempted save that mentioned in sub-section (a)."

The section then goes on to specify and describe the character of property which, for reasons of sound public policy, it declared exempt from taxation.

It has been suggested that section 508 of the Code, as amended, is in contravention of this Constitutional prohibition against the exemption from taxation of any property not declared exempt by the Constitution. This, because under the operations of section 508 property which should have been listed in 1914 but was withheld or overlooked for three years cannot now be assessed. In reply to this suggestion much that has been said with reference to section 168 of the Constitution is applicable. Suffice it to say that section 508 of the Code creates no exemption, but merely prescribes the time within which all taxable property may be lawfully assessed. See *Commonwealth v. United Cigarette Machine Co.*, *supra*. An exemption such as section 183 of the Constitution prohibits, and which is regarded with extreme disfavor by the courts of every jurisdiction, is one which amounts to an unjust discrimination resulting in a disproportionate distribution of the public burden. To declare exempt from taxation by due and timely assessment any class or classes of property used for private benefit, or the property of any particular person, natural or artificial, would be an act so palpably unjust as to be subversive of the principles of sound government and such an act as section 183 of the Constitution was designed to prevent, while to promote repose and quiet a spirit of unrest by a statute of general application prescribing a period within which all taxable property may be assessed is not an act of discrimination but is one in accordance with the settled policy of the laws.

"It is the policy of the law to put at rest stale demands of whatever character. This applies as well to taxes as to other matters. *Chicago, St. Louis & N. O. Ry. Co. et al. v. Commonwealth*, 72 S. W. 1119-20."

It must be borne in mind that there is a well recognized distinction between the duty of the General Assembly to impose a tax and the right to limit the time within which assessments can be made by the taxing officers. Subject only to express constitutional limitation the General Assembly possesses sovereign power of taxation as well as of exemption. See *Eyre v. Jacob*, 14 Gratt. (55 Va.) 422, *Richmond v. R. & D. Ry. Co.*, 21 Gratt. (62 Va.) 604, and *Commonwealth et al. v. United Cigarette Machine Co.*, *supra*. The power of releasing or relinquishing claims of the State for taxes not paid in due season, whether by direct legislation or by an act fixing a date beyond which the taxing officers may not go back in making either assessment or collections, has been claimed by the General Assembly for many years and has been exercised at least five times in the history of the Commonwealth. By act of March 10, 1832, and found on page 59 of the Acts of Assembly for 1831-2, the General Assembly remitted all taxes due and chargeable upon lands lying in any of the counties of the Commonwealth west of the Alleghany Mountains and returned delinquent for the nonpayment of taxes thereon; section 21 of an act approved June 29, 1870, entitled, "An Act for the Assessment of Taxes," fixed the year 1865 as the limit of time to which commissioners of the revenue could go back for omitted taxes, and this act appears as section 70 of chap. 33 of the Code of 1873; by act approved March 11, 1884, and found on page 498 of the Acts of Assembly for 1883-4, all taxes claimed to be due on collateral inheritances were remitted, the statute imposing such a tax having been repealed a few days previously; by an act approved February 26, 1886, and found on page 234 of the Acts of Assembly for 1885-6, the Commonwealth and the counties and corporations of the Commonwealth were forever barred from collecting taxes due and payable prior to January 1, 1876, which act was incorporated into the Code of 1887 as section 632, and has never been repealed; and by an act approved March 22, 1916, and found on page 826 of the Acts of Assembly for that year, it was provided that all assessments of intangible personal property, money and incomes for State taxes prior to the year 1903 should be conclusively presumed to be full, true and correct.



It is worthy of note that the second, third and fourth of these statutes were enacted while the Constitution of 1869 was in effect and that no one of them has ever been successfully assailed on constitutional grounds, though Section 1 of Article X of that instrument provided that "*all property, both real and personal, shall be taxed* in proportion to its value, etc.," and Section 3 of the same article provided that "The legislature may exempt all property used exclusively for State, county, municipal, benevolent, charitable, educational and religious purposes." This latter provision, by implication, with respect to the maxim, *Expressio unius, exclusio alterius*, limited the legislature in the exercise of its power of exemption to property of the character specified.

But it is with reference to section 174 of the 'Constitution of Virginia that it is most strongly suggested that section 508, as amended, is unconstitutional. Section 174 of the Constitution reads as follows:

"After this Constitution shall be in force, no statute of limitation shall run against any claim of the State for taxes upon any property; nor shall the failure to assess property for taxation defeat a subsequent assessment for and collection of taxes for any preceding year or years, unless such property shall have passed to a bona fide purchaser for value, without notice; in which latter case the property shall be assessed for taxation against such purchaser from the date of his purchase."

It will be noted that this section, so far as it relates to the question now under consideration, contains two provisions: First, a prohibition against the running of any statute of limitation against any claim of the State for taxes upon any property; and second, a declaration that the failure to assess property for taxation shall not defeat a subsequent assessment of such property and a collection of taxes thereon for any preceding year or years, subject only to the restrictions set forth.

It may be well to consider what constitutes such a "claim of the State for taxes" as the framers of the Constitution had in mind. It is submitted that a claim of the character provided for by this section of the Constitution must be based upon an

assessment, and that such assessment must be made within the time, in the manner and by the method prescribed by statute.

"The whole system of assessment and collection of taxes is dependent upon legislation, subject to clear and explicit constitutional restrictions.

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"There can be no collection of taxes except in the manner provided by law; and back taxes can only be levied by special legislative authority."

See *Commonwealth et al. v. United Cigarette Machine Co.*, 120 Va. 835.

As property omitted from taxation can only be subsequently assessed by special legislative authority; and as the whole system of assessment and the collection of taxes is dependent upon legislation; and as the General Assembly has supreme power in matters of this kind, subject only to explicit Constitutional restrictions, it must follow that a claim of the State for taxes such as may not be barred by the operation of any statute of limitation is a claim established and existing as a result of an assessment made by the proper officer, in the manner and within the time prescribed by the statutes for such cases made and provided. For illustration, we will assume that certain bonds, the property of A, were assessed in 1914 in the manner provided by law; that A failed to pay the taxes due the State as a result of such assessment before December 2, 1914, and since then has been possessed of no property out of which the amount due the State might be realized. We will assume that in 1916 the General Assembly enacted a statute of limitation, barring the collection of such taxes. Clearly such a statute would be in direct contravention of section 174 of the Constitution, the claim of the State in this case being based on a valid assessment made within the time and in the manner provided by law. If, on the other hand, on February 1, 1914, A owed certain intangible property which he failed to list and which has not since been discovered and listed for taxation; it is submitted that, under the provisions of section 508, as amended, no assessment of that property can now be made for the year 1914, and that this statute, although so resulting to the benefit of the

taxpayer, is not contrary to section 174 of the Constitution because no assessment on which a claim of the State for taxes can be based was made within the time prescribed by the statute.

"A regular and timely assessment is a prerequisite to the right of levy and collection."

See *Commonwealth v. United Cig. Mch. Co.*, *supra*.

Nor is this principle in conflict with that now well settled to the effect that under the law it is the duty of the taxpayer to see that his property is properly assessed, and to pay the tax due thereon in due season. See *Commonwealth v. Schmeltz*, 114 Va. 364; *Commonwealth et al. v. United Cigarette Machine Co.*, 119 Va. 447. These positive duties do rest upon every taxpayer, but subject to legislative direction; and if the General Assembly sees fit to say that after a certain time property omitted in past years shall not be assessed, either as a result of the voluntary act of the taxpayer, or the zeal of the assessing officer, then when that time has expired the taxpayer is acquitted of the obligation which rested upon him. The distinction lies in this: When an assessment has once been made it is always thereafter the duty of the taxpayer to pay the taxes due the State as a result of such assessment and no statute of limitation can be pleaded in bar of the State's claim for such taxes. But when no assessment had been made it is entirely within the province of the General Assembly to say that none shall be made, provided the statute laying down such a rule is general in its application, and that the mere incomplete or inchoate right of the State for taxes on the property omitted shall never become perfect.

In framing the first clause of section 174 of the Constitution the Convention was doubtless influenced by two considerations. One was that such statutes of limitation as apply to claims between persons, natural or artificial, should not operate against the Commonwealth in the exercise of its sovereign power of taxation. This, because taxes do not arise out of contract, but are imposed *in invitum*. See *Covington v. First National Bank*, 198 U. S. 100; and *Marye v. Diggs*, 98 Va. 749. Secondly, the framers of the Constitution had in mind such a statute of limitation as gave rise to the case of *Liberty Savings Bank v. Otter-*

*view Land Co.*, 9 V. L. R. 903, which case was decided by the Circuit Court of Bedford County on August 14, 1903, and a petition for a writ of error therefrom was denied by the Supreme Court of Appeals.

The officers who make assessments of property derive their authority entirely from the statutes. The General Assembly has the power to prescribe the powers and duties of land assessors, commissioners of the revenue and other assessing officers, subject only to express constitutional limitation. Therefore, the General Assembly, being vested with sovereign power of taxation, has authority to direct assessing officers with respect to the time, manner and methods in which their duties shall be discharged, so long as such statutes are general in their application.

It is submitted therefore that section 508 of the Code is not such a statute of limitation as the framers of section 174 of the Constitution had in mind. Also that, while the failure to assess property for taxation may not defeat a subsequent assessment of such property for any preceding year or years, such subsequent assessment must be made in the time and manner and by the method prescribed by statute.

It is important to remember the strong presumption which exists in favor of the constitutionality of every act of the General Assembly. See *Iverson Brown's Case*, 91 Va. 762; and *Ex parte Settle*, 114 Va. 716.

Some consideration must be accorded the fact that such a policy with respect to omitted taxes as is inaugurated by the amendment under consideration, while a radical departure in Virginia, is nothing new in the tax legislation of many states of the Union. The legislatures of at least nineteen of the states have enacted laws prescribing limited periods of time immediately prior to the assessment year beyond which the assessing officers cannot go back and assess property which has been omitted from the tax rolls. The constitutional provisions of many of these States are strikingly similar to section 174 of the Constitution of Virginia. Following is a list of the States having in operation such a policy as this, with the respective periods of time in which omitted property may be assessed:

Alabama, five years; Arizona, five years; California, one year; Florida, three years; Georgia, seven years; Idaho, one year; Iowa, five years; Kansas, one year; Kentucky, five years; Louisiana, three years; Mississippi, six years; Missouri, five years; New Jersey, three years; New York, one year; North Carolina, one year; Massachusetts, one year; Ohio, five years; Oregon, five years; and Wisconsin, three years.

It has been often and strongly suggested that this statute will be assailed on constitutional grounds. But from what quarter will such an attack come? Unless section 508 of the Code is a statute of limitation its constitutionality must be conceded. If it be a statute of limitation its constitutionality cannot be questioned by any political sub-division of the State, because that question has already been set at rest by the decision of the case of *Commonwealth et al. v. United Cigarette Machine Co. Ltd.*, 120 Va. 835, cited above. With respect to State taxes it is manifest that the operation of this statute will be in favor of the taxpayers, and the principle that the constitutionality of an act can be assailed only by one adversely affected by its operation is too familiar to require the citation of authority.

OSCAR L. SHEWMAKE.